



Organization of  
American States

Inter-American  
Commission on  
Human Rights **IACHR**

**INTER-AMERICAN COMMISSION ON HUMAN RIGHTS**

OEA/Ser.L/V/II.  
Doc. 44  
5 December 2013  
Original: Spanish

**GUARANTEES FOR THE INDEPENDENCE OF JUSTICE OPERATORS.  
TOWARDS STRENGTHENING ACCESS TO JUSTICE AND THE  
RULE OF LAW IN THE AMERICAS**

2013

Internet: <http://www.cidh.org>

of the American Convention. The IACHR also availed itself of the pronouncements of various international organizations whose mandate is to oversee compliance with international treaties. In this report, special consideration is given to the findings of the Office of the United Nations Special Rapporteur on the Independence of Judges and Lawyers (hereinafter "the UN Special Rapporteur") and the United Nations Human Rights Committee. The Commission has also considered the information provided to it by the States and various civil society organizations, and the information that government institutions and the media have made available to the public, taking care to properly check the media sources.

12. Because the Commission received so much information concerning the justice systems' institutional weaknesses and the harassment and attacks to which justice operators are subjected, it will condense that information to reflect the principal characteristics and trends identified and will reference concrete examples to illustrate the situation. The report does not pretend to be an exhaustive accounting of facts, nor does it discuss each and every event of which the Commission has knowledge. The IACHR believes that the trends identified using a number of examples can provide helpful guidance to the States and to civil society on the most serious patterns of obstruction being committed against justice operators and the challenges they pose.

13. The report was organized to take into account the various positive and negative factors that can influence the independence of justice operators, both individually and institutionally. To that end, in the first chapter the Commission sets out a number of general observations regarding the role of independent justice operators in ensuring access to justice and the relevant instruments of international law on the subject. In the second chapter, the IACHR examines what guarantees the Judicial Branch, prosecution services and public defender services must have to assure their independence at the institutional level to be assured. In the third chapter, the Commission examines the criteria that have to be observed in the processes whereby justice operators are selected and appointed. The fourth chapter discusses some of the essentials that must be present if the independence of justice operators is to be assured through proper conditions of service that allow them to exercise their rights freely. In the sixth chapter, the Commission discusses the guarantees that States must ensure in disciplinary proceedings so as not to adversely affect justice operators independence in the exercise of their functions. In the seventh chapter, the IACHR examines the advisability of having an independent body in charged with the administration and governance of judicial bodies. The report closes with a section devoted to the Commission's recommendations to the member States of the Organization.

## **I. GENERAL OBSERVATIONS ON THE INDEPENDENCE OF JUSTICE OPERATORS**

### **A. The role of justice operators in ensuring access to justice**

14. The American Convention on Human Rights and the American Declaration of the Rights and Duties of Man (hereinafter "American Declaration") affirms every person's right to a simple and prompt recourse against acts that violate any of his or

her rights, and the States' obligation to act with the necessary due diligence to prevent and redress these acts, as well as to investigate, prosecute and punish these acts when they violate criminal law.<sup>7</sup> The Inter-American Court of Human Rights (hereinafter "Inter-American Court") has held that any person whose human rights have been violated has the right "to obtain clarification of the events that violated human rights and the corresponding responsibilities from the competent organs of the State, through the investigation and prosecution that are established in Articles 8 and 25 of the Convention."<sup>8</sup>

15. The Commission has used the concept of justice operators to refer to state officials and employees who play a role in the justice systems and perform functions that are essential to respecting and ensuring the rights to protection and due process. Accordingly, for purposes of this report the IACHR is using the cover term 'justice operators' to refer to judges—who play the paramount role in the determination of rights<sup>9</sup> and to prosecutors and public defenders who, in their respective roles, are part of the process through which the State guarantees access to justice.

16. The Commission must again make the point that judges are the lead actors in ensuring judicial protection of human rights in a democratic State and the due process that must be observed all judicial proceedings.<sup>10</sup> In a democratic system, judges ensure that the acts of other branches of government and public servants in general are consistent with the conventions to which the State is party and with its constitution and laws. Judges also administer justice in disputes between private parties where a person's rights might be at stake.

17. For their part, prosecutors have multiple functions, which include the investigation of crimes, oversight to ensure the lawfulness of investigations, and enforcement of court rulings as representatives of the public interests. These functions are essential to eliminating impunity in cases of human rights violations that are crimes<sup>11</sup> and providing an effective recourse to persons whose rights have been violated. In some countries, prosecutors can even perform eminently jurisdictional functions when determining whether preventive detention is called for, or may even order preventive detention.

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<sup>7</sup> Article XVIII of the American Declaration and articles 8 and 25 of the American Convention provide that every person has the right to a simple and prompt recourse and to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, when he or she believes that his or her rights have been violated.

<sup>8</sup> I/A Court H.R. *Case of Barrios Altos v. Peru*. Judgment of March 14, 2001. Series C No. 75, para. 48.

<sup>9</sup> I/A Court H.R. *Case of the Constitutional Court v. Peru*. Judgment of January 31, 2001. Series C No. 71, para. 71.

<sup>10</sup> IACHR, *Report on the Situation of Human Rights in Venezuela*, OEA/Ser.L/V/II.118, Doc. 4 rev. 1, October 24, 2003, para. 150.

<sup>11</sup> IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*, OEA/Ser.L/V/II. Doc. 34, June 28, 2007, para. 96.

and prosecutors,<sup>21</sup> while bearing in mind the role that each of these play in ensuring the right of access to justice.

## **B. Justice operators under international law**

20. In the realm of international law, international organizations have adopted a variety of instruments and pronouncements establishing a set of principles that States must observe to ensure that judges, prosecutors and public defenders are able to properly perform their functions. A number of these instruments, which have been used in preparing this report, are premised on the larger principle that for effective access to justice to be guaranteed, then justice operators must be able to discharge their functions independently.

21. Within the United Nations system, in 1985 the General Assembly established the *United Nations Basic Principles on the Independence of the Judiciary*, which set out the minimum guarantees that must be observed to ensure the independence of the judiciary. These principles have been accepted as an instrument for measuring the independence of the judiciary in a given member state.<sup>22</sup> Since the adoption of the Basic Principles and drawing upon it, a number of universal and regional instruments have been crafted to protect the independence of the judicial branch of government.<sup>23</sup> Several of these have been cited in reports published by the Office of the United Nations Special Rapporteur containing important pronouncements on the subject.<sup>24</sup> In its own thematic

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<sup>21</sup> United Nations General Assembly. Human Rights Council. Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development. Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaut, A/HRC/20/19, June 7, 2012; Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, A/HRC/11/41, March 24, 2009, para. 19; Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, A/HRC/8/4, May 13, 2008, para. 41; and Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, A/HRC/4/25, December 18, 2006, para. 24.

<sup>22</sup> The United Nations Basic Principles on the Independence of the Judiciary were adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

<sup>23</sup> Among the instruments that build upon the Basic Principles, the General Assembly approved Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary, which provide that “[a]ll States shall adopt and implement in their justice systems the Basic Principles on the Independence of the Judiciary in accordance with their constitutional process and domestic practice.” The United Nations Economic and Social Council approved the Bangalore Principles (2002) which mention the importance of a competent, independent and impartial judiciary to the protection of human rights. At the regional level, the standards for guaranteeing judicial independence are set out in the following instruments: Commonwealth (Latimer House) Principles on the three branches of government; the European Charter on the Statute for Judges (1998) and the Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region (1995). There are other instruments as well, like the Universal Charter of the Judge and the Statute of the Ibero-American Judge, approved by associations or summits of judges or prosecutors and setting out provisions on the guarantees or principles of the independence and impartiality of justice operators.

<sup>24</sup> The reports of the Office of the United Nations Special Rapporteur on the Independence of Judges and Magistrates may be viewed at: [http://ap.ohchr.org/documents/dpage\\_s.aspx?m=87](http://ap.ohchr.org/documents/dpage_s.aspx?m=87)



reports<sup>25</sup> and within the framework of the individual petition and case system<sup>26</sup> the Commission has established a number of standards based on the principle that the independence of judges must be guaranteed to ensure that victims of human rights violations have an effective access to justice. In its own case law, the Inter-American Court has on several occasions underscored the guarantees that are assured with an independent judiciary.<sup>27</sup>

22. Specific international instruments have also been adopted with respect to prosecutors, such as the *Guidelines on the Role of Prosecutors*, approved by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders.<sup>28</sup> On the European front, the Consultative Council of European Judges and the Consultative Council of European Prosecutors adopted the Bordeaux Declaration on *Judges and Prosecutors in a Democratic Society*;<sup>29</sup> the Council of Europe's Committee of Ministers

<sup>25</sup> *Inter alia*, IACHR. *Annual Report 2012. Chapter IV. Cuba, Honduras and Venezuela*. OEA/Ser.L/V/II. Doc. 34, March 5, 2013, paras. 107 to 116, paras. 195 to 234 and paras. 464 to 496, respectively; *Report on the Situation of Human Rights in Jamaica*, OEA/Ser.L/V/II.144, Doc. 12, August 10, 2012, paras. 63 to 93; *Second Report on the Situation of Human Rights Defenders*. OEA/Ser.L/V/II. Doc.66, December 31, 2011, paras. 349 to 402; *Annual Report 2011, Chapter IV. Cuba and Venezuela*. OEA/Ser.L/V/II. Doc. 69, December 30, 2011, paras. 211 to 227 and paras. 447 to 475, respectively; *Annual Report 2010. Chapter IV. Colombia, Cuba, Honduras and Venezuela*. OEA/Ser. L/V/II. Doc. 5 corr. 1, March 7, 2011, paras. 220 to 226, 323 to 348, 472 to 482 and 615 to 649, respectively; *Democracy and Human Rights in Venezuela*, OEA/Ser.L/V/II. Doc. 54, December 30, 2009, paras. 180 to 319; *Annual Report 2009. Chapter V. Follow-up Report – Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. OEA/Ser.L/V/II.135. Doc. 40, August 7, 2009, paras. 66 to 85; *Annual Report 2008. Chapter IV. Colombia, Cuba, Haiti and Venezuela*. OEA/Ser.L/V/II.134. Doc. 5 rev. 1, February 25, 2009, paras. 134 to 139, 168 to 186, 280 to 283 and 391 to 403, respectively; *Report on the Situation of Human Rights Defenders in the Americas*, OEA/Ser.L/V/II.124, Doc. 5 rev.1, March 7, 2006, paras. 106 to 121; *Justice and Social Inclusion: The Challenges of Democracy in Guatemala*. OEA/Ser.L/V/II.118. Doc. 5 rev. 1, December 29, 2003, Chapter I, paras. 15 to 88; *Report on the Situation of Human Rights in Venezuela*. OEA/Ser.L/V/II.118. Doc. 4 rev. 1. October 24, 2003, paras. 153 to 190; *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116. Doc. 5 rev. 1 corr., October 22, 2002, para. 229; *Second Report on the Situation of Human Rights in Peru*, OEA/Ser.L/V/II.106. Doc. 59 rev.2, June 2000, paras. 1 to 5 and 133 to 149; *Report on the situation of human rights in Mexico*. OEA/Ser.L/V/II.100. Doc. 7 rev. 1, September 24, 1998, Chapter V, paras. 351 to 398; *Report on the Situation of Human Rights in Ecuador*. OEA/Ser.L/V/II.96. Doc. 10 rev. 1, April 24, 1997. Chapter III; and IACHR. *Report on the Situation of Human Rights in Haiti*. OEA/Ser.L/V.88. Doc. 10 rev. February 9, 1995, Chapter V, paras. 269 to 280.

<sup>26</sup> See, in this regard, IACHR. Application to the Inter-American Court of Human Rights in the case of Ana María Ruggeri Cova, Perkins Rocha Contreras and Juan Carlos Apitz ("*First Court of Administrative Disputes*") (Case 12,489) against the Bolivarian Republic of Venezuela, November 29, 2006; Application to the Inter-American Court of Human Rights in the case of Mercedes Chocrón Chocrón, (Case 12,556) against the Bolivarian Republic of Venezuela, November 25, 2009; Application to the Inter-American Court of Human Rights in the case of María Cristina Reverón Trujillo (Case 12,565) against the Bolivarian Republic of Venezuela, November 9, 2007.

<sup>27</sup> See in this regard, I/A Court H.R. *Case of the Constitutional Court v. Peru*. Judgment of January 31, 2001. Series C No. 71; I/A Court H.R. *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182; I/A Court H.R. *Case of Reverón Trujillo v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 30, 2009. Series C No. 197, and I/A Court H.R. *Case of Chocrón Chocrón v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2011. Series C No. 227.

<sup>28</sup> *Guidelines on the Role of Prosecutors*. Approved by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana (Cuba), August 27 to September 7, 1990 (hereinafter the "Guidelines on the Rule of Prosecutors", Guideline 10.

<sup>29</sup> Consultative Council of European Judges and the Consultative Council of European Prosecutors. *Bordeaux Declaration on Judges and Prosecutors in a Democratic Society*, Strasbourg, December 8, 2009.

adopted a recommendation to the member States on the role of public prosecution in the criminal justice system.<sup>30</sup> The European Commission for Democracy through Law (hereinafter the “Venice Commission”)<sup>31</sup> and the Office of the United Nations Special Rapporteur on the Independence of Judges and Lawyers<sup>32</sup> have also issued important documents.

23. As for Public Defenders, in Article 8(2), subparagraphs (d) and (e), the American Convention on Human Rights establishes the right of the accused to either mount his own defense or to be assisted by defense counsel of his choosing.<sup>33</sup> The *Basic Principles on the Role of Lawyers*, approved by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders<sup>34</sup> contain similar provisions as do the resolutions recently adopted by the General Assembly of the Organization of American States (OAS).<sup>35</sup>

### C. The independence of justice operators

24. Within the inter-American system, the right of access to justice follows from articles 8 and 25 of the American Convention, which set out the state obligations necessary to ensure that any person can seek protection and justice for acts that violate his or her rights. From those state obligations follow certain guarantees that States must afford to the justice operators so as to ensure their independence; with that, the State fulfills its obligation to afford persons access to justice.<sup>36</sup> In *Reverón Trujillo* the Court

<sup>30</sup> See in this regard, Council of Europe, Committee of Ministers. Recommendation Rec (2000) 19 of the Committee of Ministers to the States on the role of Public Prosecution in the criminal justice system. Adopted by the Committee of Ministers on October 6, 2000, at the 724<sup>th</sup> Meeting of Ministers, para. 16.

<sup>31</sup> European Commission for Democracy through Law (Venice Commission). European Commission for Democracy through Law (Venice Commission). *Report on European Standards as regards the independence of the judicial system: Part II - The Prosecution Service*. Adopted by the Venice Commission at its 85<sup>th</sup> plenary session (Venice, December 17-18, 2010), Strasbourg, January 3, 2011, para. 28.

<sup>32</sup> Cf. United Nations. Human Rights Council. *Report of the Special Rapporteur on the Independence of Judges and Lawyers*. A/HRC/20/19, June 7, 2012, para. 26.

<sup>33</sup> Cf. I/A Court H.R. *Case of Vélez Loor v. Panama*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2010 Series C No. 218, para. 145. The Basic Principles on the Role of Lawyers also provide that: “Any such persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services.” Basic Principles on the Role of Lawyers. Approved by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana (Cuba), August 27 through September 7, 1990, Principle 6.

<sup>34</sup> Basic Principles on the Role of Lawyers. Approved by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana (Cuba), August 27 through September 7, 1990, Principle 6.

<sup>35</sup> See in this regard, AG/RES. 2656 (XLI-O/11); AG/RES. 2714 (XLII-O/12), and AG/RES. 2801 (XLIII-O/13).

<sup>36</sup> For example, the Inter-American Court has written that the State’s obligations with respect to those facing prosecution create “rights for judges”; for example, the guarantee that they will not be subject to a discretionary removal implies that the disciplinary proceedings and sentencing proceedings in cases involving judges must necessarily respect the guarantees of due process and shall offer those affected an effective remedy.

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wrote that unlike other public officials, judges have certain guarantees due to the independence that the judicial power must have for the sake of those on trial or parties to litigation, which the Court has understood as “essential for the exercise of the judicial function.”<sup>37</sup> Those guarantees are a corollary of the right of access to justice that every person enjoys and, in the case of judges, are “reinforced guarantees” of tenure so as to thereby ensure the necessary independence of the Judicial Branch.<sup>38</sup>

25. In its *Follow-up Report - Access to Justice and Social Inclusion: the road towards strengthening democracy in Bolivia*, the Inter-American Commission discussed how critical the guarantee of independence is to the administration of justice, as it is a *condition sine qua non* for compliance with the standards of due process established by international law.<sup>39</sup> A number of international organizations and entities have underscored how important independent judges, prosecutors and public defenders are to the ability to get justice.<sup>40</sup> With specific reference to the analysis of the guarantees that States must afford to ensure that justice operators are able to perform their functions independently, international law views independence as two dimensional: the first is institutional or

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I/A Court H.R. *Case of Reverón Trujillo v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 30, 2009. Series C No. 197, para. 147.

<sup>37</sup> I/A Court H.R. *Case of Reverón Trujillo v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 30, 2009. Series C No. 197, para. 67. I/A Court H.R. *Case of Chocrón Chocrón v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2011. Series C No. 227, para. 97.

<sup>38</sup> I/A Court H.R. *Case of Reverón Trujillo v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 30, 2009. Series C No. 197, para. 67.

<sup>39</sup> IACHR. *Annual Report 2009. Chapter V. Follow-up Report – Access to Justice and Social Inclusion: The Road Towards Strengthening Democracy in Bolivia*. OEA/Ser/L/V/II.135. Doc. 40, August 7, 2009, para. 77.

<sup>40</sup> For example, in keeping with the case law of the European Court and the United Nations *Basic Principles on the Independence of the Judiciary*, the Inter-American Court held that “one of the principal purposes of the separation of public powers is to guarantee the independence of judges.” I/A Court H.R. *Case of the Constitutional Court v. Peru*. Judgment of January 31, 2001. Series C No. 71, para. 73, and *Case of Apitz Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela*. Judgment of August 5, 2008. Series C No. 182, para. 55. See also, IACHR, *Democracy and Human Rights in Venezuela*, para. 184. As for prosecutors, the Inter-American Court has written that investigations into violations of human rights must be prompt and thorough; but they must also be independent and impartial. Cf. *Case of Cantoral Huamani and García Santa Cruz v. Peru*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 10, 2007. Series C No. 167, paras. 132 and 133. For its part, the Office of the United Nations Rapporteur has singled out the importance of ensuring that prosecutors are able to function independently, autonomously and impartially. Cf. United Nations. Human Rights Council, *Report of the Special Rapporteur on the Independence of Judges and Lawyers*. A/HRC/20/19, June 7, 2012, para. 26. Concerning public defenders, the United Nations Special Rapporteur on the Independence of Judges and Lawyers has written in general terms that “offices of the public defender should be made independent of the executive branch.” United Nations General Assembly, Report of the Rapporteur on the Independence of Judges and Lawyers, A/HRC/17/30/Add.3, April 18, 2011, para. 73. Within the Organization of American States, in its resolution titled *Guarantees for Access to Justice. The Role of Official Public Defenders*, the General Assembly resolved “[t]o recommend to member states that already provide free legal counsel to take steps to ensure that Official Public Defenders operate independently.” AG/RES. 2656 (XLI-O/11) *Guarantees for Access to Justice. The Role of Official Public Defenders*, June 7, 2011, operative para. 4.



systemic, while the second is functional, referring to justice operators' individual independence in performing their functions.<sup>41</sup>

26. In the case of the institutional dimension, one of the main factors to be considered is the degree of independence that the judicial branch, as a system, has with respect to the other branches of government so that sufficient guarantees are in place to protect the judicial institution from abuses or unreasonable restrictions on the part of the other branches of government or State institutions. Addressing this aspect of independence, the United Nations Human Rights Committee pointed out, for example, that a situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal.<sup>42</sup>

27. In the case of the functional dimension or individual exercise of judicial functions, one has to examine whether justice operators have the guarantees of independence that will enable them to freely discharge their functions within the institutions of justice in cases they are to decide, prosecute or defend. This dimension involves more than just the procedures and qualifications for the appointment of judges. It also involves the guarantees of their security of tenure until the mandatory retirement age or the expiration of their term of office, where such exists, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature.<sup>43</sup>

28. In exercise of its mandate of promoting the observance and protection of human rights, one of the Commission's priorities is the functioning of the justice systems in the OAS member states and the guarantees in place to ensure their independence both at the institutional and individual levels, which also means clearing away any obstacles obstructing their access to justice.

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<sup>41</sup> The Inter-American Court has described the two aspects of independence as *de jure* and *de facto*, writing that this kind of independence "requires not only hierarchical or institutional independence, but also real independence." I/A Court H.R. *Case of Zambrano Vélez et al. v. Ecuador*. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, para. 122.

<sup>42</sup> CCPR/C/GC/32 (footnote 1), paragraph 19 cited in United Nations. General Assembly. Human Rights Council. Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, A/HRC/11/41, March 24, 2009, paragraph 18.

<sup>43</sup> CCPR/C/GC/32 (footnote 1), para. 19 cited in United Nations, General Assembly. Human Rights Council. Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, A/HRC/11/41, March 24, 2009, para. 52.